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IN THE

Supreme Court of the United States

VERIZON INTERNET SERVICES, INC.,

Cross-Petitioner,

v.

RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.,

Cross-Respondent.

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR CROSS-PETITIONER

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I. This Court Should Not Address the Statutory Issue Without Also Addressing the Alternative Ground for Affirmance Under Article III.

Contrary to RIAA's suggestion, RIAA Resp. 1, Verizon does not believe that this Court should consider the Article III question presented by these unique subpoena enforcement actions independent of the statutory interpretation question presented in RIAA's petition (No. 03-1579). Verizon's position remains that the D.C. Circuit correctly interpreted the statute and that there is no conflict and no pressing need for this Court's intervention. That is why Verizon filed a *conditional* cross-petition. Verizon thus respectfully submits that this Court should deny *both* petitions.

The United States is undoubtedly correct that where, as here, "the courts of appeals are not divided," this Court's review of RIAA's statutory interpretation question is "especially inappropriate." U.S. Opp. 9. Similarly, as the United States explains, "'[j]udging the constitutionality of an Act of Congress is properly considered the gravest and most delicate duty that this Court is called upon to perform.'" *Id.* The D.C. Circuit thus properly avoided serious Article III and First Amendment issues by interpreting Section 512, according to its terms, not to apply where the Internet service provider performs a mere conduit function. Opp. 25-30. This principle of constitutional avoidance, which governs this Court as much as lower courts, is one reason that this Court, if it grants review on the statutory question, should also review the Article III question (which might shape the statutory resolution).[1]

If this Court grants RIAA's petition on the statutory interpretation question, *despite* the fact that it meets none of the traditional criteria for review, it should also consider the alternative Article III ground for affirmance. On this point, RIAA agrees with Verizon:

> [B]ecause both RIAA's interests and those of the public would be served by a conclusive resolution

1. The doctrine of constitutional avoidance does not, as the United States would have it, U.S. Opp. 9-10, counsel this Court to refer constitutional issues to another court where those issues *cannot* be avoided. It is an interpretive device applicable in *every* federal court, not a principle of organization as *between* this Court and the lower appellate courts.

> of all of Verizon's potential objections to § 512(h), and because Verizon could raise the issue as an alternative ground for affirmance if RIAA's petition is granted, RIAA has no objection to this Court considering the Article III issue in conjunction with the question presented in RIAA's petition.

RIAA Resp. 1.

While the United States disagrees with this position, it cannot dispute that: i) the Article III issue was briefed by all three parties and fully argued below; ii) the district court decided the issue in a lengthy decision; iii) the issue has been raised in every DMCA subpoena proceeding to date; and iv) certainty regarding the legal status and enforceability of these unique subpoenas cannot be obtained until the question of Article III power to issue and enforce them has been resolved.[2] Verizon thus submits, and RIAA concurs, that this Court should not grant RIAA's petition without also considering the alternative Article III ground for affirmance.

II. The Multifarious and Conflicting Article III Justifications Offered by the United States and RIAA Demonstrate that the Article III Issue Is Substantial.

After over two years, many rounds of briefing, and two hearings below on the Article III issue, RIAA and the United States continue to disagree over what constitutional powers are being exercised here and under what "theory" these subpoenas can fit within the judicial role in particular and our scheme of separation of powers in general. Although none of the theories proffered by RIAA or the United States saves the DMCA's novel subpoena provision from Article III infirmities, the very fact that RIAA and the United States so fundamentally disagree on the nature of the provision and its import for Article III purposes only underscores the need for this Court's resolution of the serious Article III question at issue: whether

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2. The United States suggests that even if this Court were to consider the Article III issue, the validity of RIAA's subpoenas could not be definitively resolved because there remains an outstanding First Amendment issue that Verizon has not properly placed before this Court. U.S. Opp. 10-11. Apparently, the United States ignored the extensive discussion of the First Amendment in Verizon's opposition to RIAA's petition. Opp. 25-27.

the issuance and enforcement of binding judicial process pursuant to 17 U.S.C. § 512(h), outside the context of a "case or controversy," violates Article III of the United States Constitution and constitutionally mandated separation of powers principles.

A. RIAA's Position That the Clerk Performs Only Ministerial or Article I Functions when It Issues Subpoenas in the Court's Name Is Without Merit.

RIAA now fully embraces the district court's theories that the clerk's issuance of a DMCA subpoena is either a "ministerial" act or an exercise of delegated Article I authority and for those reasons does not implicate Article III, Pet. 61a-62a. RIAA Resp. 8-15. Although the United States acknowledges this holding in a footnote, U.S. Opp. 13 n.2, it does not embrace this position. On the contrary, the United States concedes that, "the issuance of subpoenas has long been a routine responsibility of federal courts, and can fairly be characterized as a duty 'of a *judicial* nature.'" *Id.* at 18 (emphasis added).

As the United States concedes, the issuance of any subpoena in the name of the court backed by Article III enforcement power is a judicial act. *Id.* at 13 n.2 ("[T]raditional subpoenas are ordinarily regarded as judicial orders (even if issued, as here, without direct judicial involvement). . . ."); Cross-Pet. 17 & n.11. Such judicial orders carry with them the full enforcement power of the court the moment they are issued, subjecting the recipients to "contempt of court" if they refuse to answer. U.S. Opp. 13 n.2. Thus, DMCA subpoenas undoubtedly invoke judicial power under Article III.

None of the cases RIAA cites for the proposition that the issuance of a DMCA subpoena is "ministerial" involves the issuance of a writ of subpoena by the clerk of a federal court carrying the full enforcement power of the federal courts, RIAA Resp. 13-14. *See, e.g., Custiss v. Georgetown & Alexandria Tpk. Co.*, 10 U.S. (6 Cranch) 233, 237 (1810) (recordation of condemnation verdict where "[t]he law asks not the intervention of the court"); *Lewis v. NLRB*, 357 U.S. 10, 14-15 (1958) (issuance of subpoenas by regional director of the NLRB); *Morrison v. Olson*, 487 U.S. 654, 681 & n.19 (1988) (decision regarding extension of time "ministerial").

Nor is RIAA aided by cases examining the authority of non-Article III actors to issue subpoenas. RIAA Resp. 8-11 (also citing statutes under which non-Article III actors may issue subpoenas). The power of executive agencies to issue administrative subpoenas comes both from their Article II authority to "take Care that the Laws be faithfully executed" and their Article I authority delegated by Congress.

For example, *ICC v. Brimson*, 154 U.S. 447 (1894), relied upon heavily by RIAA, RIAA Resp. 9-10, involved the exercise of judicial power to enforce administrative subpoenas issued by the ICC after a refusal to comply. Because a live case or controversy over federal questions under the Interstate Commerce Act existed at the time judicial enforcement was sought, the Court held that the statute did not require the federal courts to act outside of Article III. 154 U.S. at 485. A federal agency was asking a federal court to decide a question of federal law—*i.e.*, the limits of agency authority to investigate and compel parties to produce evidence in administrative investigations. Nothing in *Brimson* or its progeny suggests that Congress could have authorized the *federal courts* to issue and enforce subpoenas to investigate possible violations of the Interstate Commerce Act. *See United States v. Hill*, 694 F.2d 258, 263 (D.C. Cir. 1982) ("At least since *ICC v. Brimson* . . . , federal courts have drawn a sharp distinction between agency power to *issue* subpoenas and judicial power to *enforce* them.").

This Court's subsequent decisions in *United States v. Morton Salt*, 338 U.S. 632 (1950), and *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72 (1988), preclude entirely RIAA's misapplication of *Brimson* and make clear that courts may not conduct investigations into possible civil or criminal wrongdoing in the same manner as administrative agencies. Cross-Pet. 15-16. Federal courts are constrained by Article III to adjudicate only live cases or controversies pending before them, and not even RIAA suggests that Congress could, for example, authorize the adjudication of moot causes or causes that are not ripe for review. Yet under RIAA's theory, Congress could authorize clerks of the federal courts to issue judicially enforceable

subpoenas in moot proceedings or where the underlying dispute is not ripe or could not otherwise be brought in federal court. RIAA Resp. 9 n.2 (arguing that no "case or controversy [is necessary] at the time of issuance"). It makes no sense to say that advisory opinions are forbidden, but that the judiciary can use its tools of investigation outside the presence of any concrete dispute over federal law that could lead to an opinion. It is unsurprising that RIAA can cite no authority to support this end-run around Article III and that the United States refuses to endorse it.

Finally, RIAA itself acknowledges that even if issuance of a DMCA subpoena could otherwise properly be characterized as a "ministerial" or non-judicial function, such a delegation runs afoul of Article III and separation of powers principles if it "aggrandizes the authority of the judiciary []or interferes with its operation." *Id.* at 12-13. RIAA nonetheless ignores the interference its *own* DMCA subpoena requests caused the federal courts during the brief period it was permitted to seek issuance of DMCA subpoenas. Cross-Pet. 22-23.

RIAA obtained thousands of subpoenas that forced at least one clerk's office to reassign resources and employees away from legitimate judicial tasks to perform what RIAA terms "ministerial" or delegated Article I powers. If RIAA is correct that issuance of DMCA subpoenas is an Article I function, then diversion of substantial court resources to perform that function, regardless of how much it *resembles* the traditional judicial function under Federal Rule of Civil Procedure 45, RIAA Resp. 15, clearly aggrandizes the authority of the judiciary and interferes with its judicial operation in violation of constitutional separation of powers principles.

B. The United States' Primary Position that a Case or Controversy Exists Between Some Purported Copyright Owner and the Alleged Infringer Is Precluded by this Court's Precedent.

The United States wisely concedes that "the issuance of a subpoena under Section 512(h) . . . involves an exercise of Article III *judicial power*," U.S. Opp. 13 n.2 (emphasis added), and stakes its defense of the DMCA subpoena provision on the theory that there exists a hypothetical case or controversy

between the purported copyright owner and the alleged infringer at the time the subpoena is issued. *Id.* at 12-13. Under the United States' reasoning, because there may be a controversy that *could be* brought in federal court (namely, a copyright infringement action), the judicial subpoena process *can be* invoked. *Id.*; *see also* RIAA Resp. 4-8. Such a *hypothetical* case or controversy has never been found to justify invocation of the Article III powers of a federal court. A case or controversy must be *brought* in the federal court seeking recognized judicial relief in order to invoke the court's jurisdiction.[3]

As applied by RIAA here, Section 512(h) permits purported copyright owners or their agents to invoke the federal judicial power without bringing that infringement action in federal court. Try as the United States might to equate the DMCA application process with the filing of an infringement action, they are fundamentally different, as the former is the mere request for judicial *process* (fact-gathering) and the latter is a request for judicial *relief* (injunctive or otherwise to remedy infringement).[4]

As Verizon explained in its cross-petition and the United States does not address, the DMCA subpoena requester does not place *any* issue of federal law before the district court. Cross-Pet. 10. Section 512(h) thus takes an investigative tool

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3. The United States does not endorse RIAA's last-resort argument that Section 512(h) confers on the subpoena requester an enforceable federal right to information from the Internet service provider such that there is an actual case or controversy between the requester and the Internet service provider. RIAA Resp. 15-18; *id.* at 9 n.2. RIAA's theory that Section 512(h) can be analogized to federal statutory causes of action seeking information, such as those found in ERISA or FOIA, was flatly rejected by the district court, Pet. 74a n.12, and for good reason. Section 512(h) does not itself create a private right of action, and the mere curiosity or desire for information held by the Internet service provider is no more a "case or controversy" than any *ex parte* discovery request made in federal court.

4. The United States asserts that "[a] party seeking a subpoena under Section 512(h) thus must set forth the *functional equivalent* of a *prima facie* claim of copyright infringement," U.S. Opp. 13 (emphasis added), and ignores entirely the facts that a person seeking information pursuant to Section 512(h) need not aver each element of an infringement action or even state a cause of action and need not even be a potential *party* to an infringement suit (RIAA, for example, cannot bring infringement actions on behalf of its copyright owner members.). Cross-Pet. 9-10.

that is proper when used in the context of an actual case or controversy (the third-party subpoena) and disconnects it from its only constitutionally sanctioned use—the development of facts to aid in the resolution of a live case of federal law between adverse parties. *See Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937) ("[The controversy] must be a real and substantial controversy admitting of a specific relief through a decree of conclusive character . . . .").

Even where this Court has recognized that there is some flexibility in the form of the vehicle through which a case or controversy may be brought in federal court, U.S. Opp. 12-13; RIAA Resp. 8, it has never suggested that judicial process can be invoked outside of an actual pending case or controversy. Thus, even in the declaratory judgment context, at the outer edge of federal court jurisdiction, there must be an active case or controversy between adverse parties before the court and an issue of federal law to be decided. *See Aetna Life*, 300 U.S. at 241 ("Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised" in a declaratory judgment action.); *Nashville, Chattanooga & St. Louis Ry. v. Wallace*, 288 U.S. 249, 264 (1933) (upholding declaratory judgment action where "case retains the essentials of an adversary proceeding, involving a real, not a hypothetical, controversy, which is finally determined by the judgment"). The DMCA subpoena, by contrast, is an *ex parte* request to gather facts that likely will never see the inside of a federal courtroom for any purpose. RIAA has taken this position, arguing that under the DMCA, it is entitled to judicial process without any expectation that it will be a party to a federal lawsuit and without seeking any judicial relief as to the claimed infringement.

RIAA invokes Federal Rule of Civil Procedure 27 to support its assertion that "[a]ll that is required is the existence of a *controversy* cognizable in federal court, not the existence of a pending *case*." RIAA Resp. 4-8 (emphases added). No such distinction between the constitutional terms "case" and "controversies" exists such that the word "controversy" can

be read to describe an ethereal dispute not yet brought into federal court. On the contrary, this Court has clarified that "[t]he term 'controversies,' if distinguishable at all from 'cases,' is so in that it is *less* comprehensive than the latter, and includes only suits of a civil nature." *Aetna Life*, 300 U.S. at 229.

Moreover, the attempt to equate Section 512(h) and Rule 27 fails miserably. First, both RIAA and the United States suggest that the close connection between Rule 27 and an actual case or controversy is somehow weakened by the fact that a would-be *defendant* may invoke the rule. U.S. Opp. 15-16; RIAA Resp. 6. The point for purposes of Article III is that under Rule 27, the party seeking to perpetuate known evidence must aver that it expects to be *a* party to an actual case or controversy brought in federal court.[5] Under Section 512(h), the subpoena requester may have no ability ever to be a party (plaintiff *or* defendant) to an actual infringement action and need not have any expectation of being a party to such a suit.

Second, both RIAA and the United States assert that the nature of the DMCA subpoena as a mere discovery tool, divorced from any need to perpetuate testimony to be used in an actual federal lawsuit, is irrelevant under Article III. U.S. Opp. 16; RIAA Resp. 6-7. They also claim that there is no Article III import to the absence of any adversarial process before a

5. RIAA misreads the historical antecedent to Rule 27 as requiring no connection to an actual case or controversy. RIAA Resp. 6. In fact, Congress in 1789 merely clarified that the Judiciary Act did not affect the ability of litigants to take depositions "in *perpetuam rei memoriam*" as long as the underlying matter could be brought in federal court. 1 Stat. 90 (Sec. 30). It thus made clear only that no such depositions could be taken where the matter was *not* "cognizable in any court of the United States," and did not broaden such pre-suit depositions to permit discovery where it was not necessary to perpetuate testimony or where the suit may never be brought. *Id.* Thus, when the Advisory Committee discussed the creation of Rule 27 itself, it made clear that the rule was limited to traditional and "ordinary cases of perpetuation of evidence," where

> the court has to make an order saying that there shall be no examination unless necessary to prevent a failure or delay of justice, and in reaching that conclusion he considered all of these facts stated in the petition, that you cannot bring your suit, that your witness is likely to die, and all that sort of thing.

Federal Rules of Civil Procedure and Proceedings of the American Bar Institute 292-93 (W. Dawson ed. 1938).

DMCA subpoena may issue. U.S. Opp. 16-17; RIAA Resp. 7. But the presence of adversarial parties, who seek resolution of some issue of federal law and request some form of judicial relief based upon that resolution, *are* the essential components of a constitutional "case or controversy." Section 512(h) possesses none of these essentials, not to mention its utter lack of historical pedigree compared to suits to preserve testimony.

Finally, RIAA posits that Rule 27 is *less* connected to an actual case or controversy than is the DMCA subpoena process, presumably because Section 512(h) is limited to allegations of copyright infringement whereas Rule 27 applies to any federal cause of action. RIAA Resp. 5. It is not the scope of the federal rights that *could be brought* in federal court that creates the Article III problem for the DMCA discovery device; rather, it is the fact that the subpoena requester may invoke the judicial process to obtain information for purposes wholly divorced from an actual case or controversy.[6]

C. Neither RIAA Nor the United States Can Reconcile Its Theory with this Court's Article III Precedent.

With no single coherent theory for why Section 512(h) withstands Article III scrutiny, both the United States and RIAA understandably run from this Court's precedents that outline the essential attributes of a case or controversy. Thus, buried at the end of the United States' brief (pp. 18-19) and in a single paragraph and footnote in RIAA's brief (p. 11 & n.5) are both parties' attempts to sweep aside this precedent. These cursory attempts fail.

Both the United States and RIAA try to distinguish a series of opinions dating back to 1792 as addressing only the invalidity of advisory opinions. U.S. Opp. 18; RIAA Resp. 13 n.5. They miss the point. It is true, of course, that from the Framers' time to the present, this Court has consistently held that Article III forbids the use of the federal courts as free floating *advisory* bodies to *issue decisions* unconnected to the

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6. The handful of statutes that both the United States and RIAA claim are analogous to Section 512(h) are readily distinguishable. U.S. Opp. 17-18; RIAA Resp. 10-11. None of these statutes allows a private party to use a judicially issued and enforced writ of subpoena to gather evidence that the party is then free to use for any non-adjudicatory purpose it chooses.

adjudication of actual cases or controversies. It is equally true, however, that this precedent precludes the use of the federal courts as free floating *investigative* bodies to *discover facts* unconnected to the adjudication of actual cases or controversies. Cross-Pet. 15 (citing cases). In effect, both the United States and RIAA are arguing that a federal court could issue *judicial process* unconnected to adjudication of an actual case or controversy where it could not otherwise issue a *judicial decision*. This reasoning defies logic and is directly foreclosed by *Morton Salt* and *Catholic Conference*, which made explicit that the Article III limitations on federal courts' authority to issue subpoenas are as binding as the limitations contained in the Bill of Rights. Cross-Pet. 15-16.

The United States' and RIAA's *only* answer to these established precedents, which date back to *Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792), is that here a statute specifically authorizes the use of Article III power outside a case or controversy. U.S. Opp. 19; RIAA Resp. 11. This is confession as defense. *Morton Salt* spoke not of congressional authorization but of "limitations inherent in the body that issues . . . [subpoenas] because of the provisions of the Judiciary Article of the Constitution," 338 U.S. at 642, and both *Morton Salt* and *Catholic Conference* found the limitations of Article III analogous to those contained in the Bill of Rights, *Catholic Conference*, 487 U.S. at 76 (quoting *Morton Salt*, 338 U.S. at 642). If the principles that run from *Hayburn's Case* to *Catholic Conference* are to be modified or overruled, that decision should come from this Court.

CONCLUSION

For the foregoing reasons and those enumerated in Verizon's conditional cross-petition, Verizon respectfully submits that if this Court grants RIAA's petition in No. 03-1579, it should also grant Verizon's conditional cross-petition.

Respectfully submitted.

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